

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARVIS JAVELL ROBERTS,

Defendant-Appellant.

UNPUBLISHED

June 19, 2007

No. 266650

Kent Circuit Court

LC No. 05-000769-FC

Before: Kelly, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm defendant's convictions, but remand for correction of defendant's presentence investigation report.

Defendant first argues on appeal that he was denied a fair trial by the prosecutor's misconduct. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). If the defendant's substantial rights are affected, such that the prosecutor's misconduct affected the outcome of the lower court proceedings, we must exercise our discretion in deciding whether to reverse the defendant's convictions. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Reversal is not required if the prejudicial effect of the prosecutor's misconduct could have been cured with a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant first claims that the prosecutor engaged in misconduct when he asked defendant if earlier witnesses had lied. Because credibility is a determination for the trier of fact, it is improper for a prosecutor to ask a defendant to comment on the credibility of witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). We agree with defendant that the prosecutor violated this rule when he asked defendant if earlier witnesses had lied. However, reversal is not required. Defendant could have prevented this line of questioning with a timely objection and any prejudice could have been cured with a cautionary instruction. *Id.* at 18; *Watson*, *supra* at 586. In addition, we note that the trial court's instruction to the jury, that it was to determine the credibility of witnesses, likely cured any prejudice defendant suffered when the prosecutor asked him if earlier witnesses had lied. *People v Abraham*, 256 Mich App 265, 279;

662 NW2d 836 (2003) (“Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.”). Therefore, defendant is not entitled to any relief on this basis.

Defendant also claims that the prosecutor engaged in misconduct when he misrepresented the testimony of earlier witnesses during his cross-examination of defendant. A prosecutor may not misrepresent the evidence presented. *Watson, supra* at 588. Again, we agree with defendant that the prosecutor violated this rule. Contrary to the prosecutor’s statements, it was not the testimony of “[a]ll the witnesses” that defendant raised and pointed the gun at Mario Houston, nor was it the testimony of “[e]very single witness” that defendant was drinking beer, smoking marijuana, and passing guns on the porch. Likewise, “the witnesses” did not testify that defendant called Houston back from his car, nor did Arthur Brown testify that defendant was with him and Ryan Averhart when they looked at Averhart’s gun. However, as before, reversal is not required. If defendant had objected, a curative instruction could have cured any prejudice suffered by defendant. See *People v Cross*, 202 Mich App 138, 143-144; 508 NW2d 144 (1993). In addition, the trial court’s instruction to the jury, that it must decide the case only on the evidence properly admitted, which did not include the lawyers’ statements or questions to the witnesses, dispelled any prejudice defendant suffered when the prosecutor misrepresented the testimony of earlier witnesses. *Abraham, supra* at 279. Defendant is not entitled to a reversal of his convictions on the basis that the prosecutor misrepresented the testimony of earlier witnesses.

Defendant next claims that the prosecutor engaged in misconduct when he argued Brown’s prior inconsistent statement, that defendant was with him and Averhart when they looked at Averhart’s gun, as substantive evidence in his closing argument. Because a prosecutor may not argue facts not in evidence, it is improper for a prosecutor to argue statements used solely for impeachment purposes as substantive evidence. *People v Dalessandro*, 165 Mich App 569, 581-582; 419 NW2d 609 (1988). When we review claims of prosecutorial misconduct, we evaluate the challenged remarks in the context in which the remarks were made. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The prosecutor, in his closing argument, used Brown’s prior inconsistent statement as evidence that Brown lied about arriving at Lisa Torres’s home by himself. The prosecutor then argued that Brown’s lie was important because, if defendant had been at Torres’s house for a significant period before the shooting, defendant had the opportunity to do what several witnesses said he was doing: drink alcohol, smoke marijuana, and pass guns around the porch. From the context of the prosecutor’s argument, it is clear that he did not use Brown’s prior inconsistent statement to argue that defendant saw guns being passed around on the porch. He used Brown’s prior inconsistent statement to argue that Brown was lying at trial. The prosecutor did not improperly argue Brown’s prior inconsistent statement as substantive evidence. Defendant is not entitled to a new trial on the basis of prosecutorial misconduct.

Defendant next argues on appeal that the trial court erred when it failed to instruct the jury on involuntary manslaughter. However, when a defendant expressly approves the jury instructions given by the trial court, he waives any appellate challenge to the instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). In the present case, after the trial court instructed the jury, defendant stated that he was satisfied with the instructions as given. Thus, defendant has waived any appellate review of the trial court’s instructions. *Id.*

Even if we were to review defendant’s claim that the trial court erred in failing to instruct the jury on involuntary manslaughter, because defendant did not request an involuntary

manslaughter instruction, we would review defendant's claim for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001). And, if we were to find that the trial court plainly erred in failing to instruct the jury on involuntary manslaughter, defendant has the burden to prove that the trial court's error affected the outcome of his trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Assuming, without deciding, that an involuntary manslaughter instruction should have been given, defendant has not shown that the trial court's failure to instruct the jury on involuntary manslaughter affected the outcome of his trial. Defendant merely argues that the trial court's failure to instruct the jury on involuntary manslaughter prevented him from arguing that he acted with gross negligence. However, the trial court's failure to instruct the jury on involuntary manslaughter only prevented the jury from convicting defendant of involuntary manslaughter. Nothing precluded defendant from arguing that he only acted with gross negligence, rather than with malice, and that, therefore, he should be acquitted of the murder charge. Accordingly, defendant's argument that, because the trial court failed to instruct the jury on involuntary manslaughter, he was prevented from arguing that he acted with gross negligence is without merit and does not establish that the alleged instructional error affected the outcome of the proceedings. *Id.* at 763.

Defendant also argues on appeal that he was denied the effective assistance of counsel. To preserve a claim of ineffective assistance of counsel for appellate review, a defendant must move for a new trial or for a *Ginther*¹ hearing. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Because defendant failed to request a new trial or a *Ginther* hearing, our review of defendant's claims that he was denied the effective assistance of counsel is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish a claim for ineffective assistance of counsel, "a defendant must prove that his counsel's performance was deficient and that, under an objective standard of reasonableness, defendant was denied his Sixth Amendment right to counsel." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Counsel is presumed to have provided effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise. *Id.* The defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *Sabin, supra* at 659. A defendant must also prove that his counsel's deficient performance was prejudicial to the extent that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first claims that he was denied the effective assistance of counsel because defense counsel failed to object when the prosecutor improperly asked defendant to comment on the credibility of witnesses, misrepresented the testimony of earlier witnesses, and argued Brown's prior inconsistent statement as substantive evidence. As we have already stated, the prosecutor did not argue Brown's prior inconsistent statement as substantive evidence. Accordingly, any objection to the prosecutor's closing argument would have been futile.

¹ *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). However, objections to the prosecutor's cross-examination of defendant would not have been futile as, already established, the prosecutor clearly engaged in misconduct when he asked defendant to comment on the credibility of witnesses and misrepresented the testimony of earlier witnesses. Counsel's performance in failing to object to the obviously improper questioning falls below an objective standard of reasonableness.

In order to prevail on his claims that counsel was ineffective for failing to object to the prosecutor's improper questioning of defendant regarding the credibility of witnesses and his misrepresentation of the evidence, defendant must demonstrate that, but for counsel's errors, the results of the proceeding would have been different. *Carbin, supra*. Defendant does not even attempt such a demonstration, and we find, on the record before us, that he has not met his burden of establishing that relief is warranted based on the ineffective assistance of counsel. Defendant handled the prosecutor's questions well, and the jury was instructed that they were to decide the credibility of witnesses and decide the case based on the evidence.

Defendant also claims that he was denied the effective assistance of counsel because counsel failed to request an involuntary manslaughter instruction. The decision to request a jury instruction on a lesser included offense is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). "The decision to proceed with an all or nothing defense is a legitimate trial strategy." *People v Nickson*, 120 Mich App 681, 687; 327 NW2d 333 (1982). Defendant argues that counsel's failure to request an involuntary manslaughter instruction could not have been trial strategy because counsel, by acquiescing to a voluntary manslaughter instruction, was willing to risk a conviction on a lesser included offense of murder. Thus, the approach was not an "all or nothing" strategy.

We do not believe that counsel's acquiescence to a voluntary manslaughter instruction indicates that counsel did not proceed with an "all or nothing approach." In his closing argument, counsel stated that defendant did not shoot at Houston while under a state of "emotional excitement." In addition, counsel made no argument that Houston's threats to defendant were sufficient provocation to place him under the influence of passion or hot blood. See *People v Hess*, 214 Mich App 33, 38; 543 NW2d 332 (1995). Thus, as apparent by his closing argument, counsel did proceed with an "all or nothing approach." Even though the trial court instructed the jury on voluntary manslaughter, counsel provided the jury with no basis to convict defendant of voluntary manslaughter. Counsel simply urged the jury to acquit defendant on the basis that he acted in self-defense or on the basis that defendant did not act with malice. Because it is not apparent from the record that counsel's failure to request an involuntary manslaughter instruction was not a matter of sound trial strategy, defendant has failed to establish that counsel's performance fell below an objective standard of reasonableness. *Mack, supra* at 129.

Defendant finally argues on appeal that, because his presentence investigation report (PSIR) was not corrected to conform with the trial court's order that certain, requested language be added to the agent's description of the offense, remand is necessary for correction of the PSIR. We agree.

The Department of Corrections (DOC) makes critical decisions regarding a defendant's status based on the information contained in the defendant's PSIR. *People v Norman*, 148 Mich

App 273, 275; 384 NW2d 147 (1986). “Thus, the presentence investigation report should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report.” *Id.* When ordered corrections are not made to the PSIR, remand is appropriate so that the trial court can correct the PSIR and transmit a corrected copy to the DOC. *People v Dilling*, 222 Mich App 44, 53-54; 564 NW2d 56 (1997). Because defendant’s PSIR failed to reflect the trial court’s determination that the language requested by defendant was necessary to the accuracy of the PSIR, we remand the present case for the limited purpose of allowing the trial court to correct the PSIR and transmit a corrected copy to the DOC. *Id.*

Affirmed, but remanded for correction of defendant’s PSIR. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Jane E. Markey

/s/ Michael R. Smolenski